MAJLIS UGAMA ISLAM DAN ADAT RESAM MELAYU PAHANG

v.

FAR EAST HOLDINGS BHD & ANOR

HIGH COURT MALAYA, KUANTAN
SURAYA OTHMAN JC
[ORIGINATING SUMMONS NO: MT1-24-263-2006]
27 AUGUST 2007

ARBITRATION: *Stay of Proceedings - Application - Arbitration clause in joint venture agreement - Both parties eager to refer dispute for arbitration but stalemate as to choice of an arbitrator - Whether proceedings should be stayed and dispute referred to arbitration*

ARBITRATION: *Procedure - Appointment of arbitrator by court - Stalemate between parties as to choice of an arbitrator - Whether court can refer matter to D-KLRCA for appointment of arbitrator - Arbitration Act 2005, ss. 10(2), 13*

ARBITRATION*: Procedure - Time - Arbitral proceedings commenced before 31 December 2005 to be governed by Arbitration Act 1952 - Arbitral proceedings commenced after 31 December 2005 to be governed by implication by Arbitration Act 2005*

A Joint Venture Agreement ('JVA') between the appellant, Majlis Ugama Islam Dan Adat Resam Melayu Pahang ('MUIP'), and the respondents, Far East Holdings Berhad ('FEHB') and Kampong Aur Oil Palm Company Sdn Bhd ('KAOP'), was signed on 16 January 1992. Subsequently disputes arose in relation to the JVA and the appellant filed an originating summons ('OS') on 22 September 2006 against the respondents for certain declarations on matters pertaining to the JVA. The respondents on receipt of the OS wrote to the appellant on 16 October 2006 referring to cl. 5.01 of the JVA that required such disputes to be decided by an arbitrator. The respondents were willing to refer the disputes to arbitration, and that being so, on 8 November 2006 they filed a summons in chambers ('the application') praying for the 'OS' to be stayed under s. 10 of the Arbitration Act 2005 ('the 2005 Act'). The parties could not agree on the choice of an arbitrator and the appellant objected to the respondents' suggestion that the matter be referred to the Director of Kuala Lumpur Regional Centre for Arbitration ('D-KLRCA') for such appointment. The court heard the application and allowed the stay of proceedings. The court went further and ordered that the dispute between the parties be referred to the D-KLRCA for the appointment of an arbitrator. The appellant appealed

against these orders. The appellant submitted that no action was taken by the respondents to refer the matter for arbitration despite the fact that the dispute had been ongoing since 2002 and that the respondents only raised the issue of arbitration when the substantive application *ie*, the OS was filed on 22 September 2006.

Held (allowing the respondents' application):

(1) The appellant was estopped from contending that the respondents took no action to refer the matter for arbitration, since by its own conduct it too was eager to refer the matter for arbitration and only recoiled from that recourse after a stalemate as to the choice of an arbitrator arose. Therefore, the OS proceedings should be stayed and the dispute referred to arbitration. (paras 14 & 15)

(2) The 2005 Act came into force on 31 December 2005, the date it was gazetted and became law. Any arbitral proceedings commenced before 31 December 2005 is governed by the 1952 Act, and, likewise, any arbitral proceedings commenced after 31 December 2005 will be governed, by implication, by the 2005 Act. (para 20)

(3) The arbitral proceedings commenced when the respondents wrote to the appellant on 16 October 2006 protesting on the appellant's action in taking the dispute to the High Court by way of OS application and requesting the appellant to refer the dispute for the arbitration. Therefore by way of interpretation of s. 51(2), the law governing the arbitration agreement and arbitral proceedings in this case would be the 2005 Act and not the 1952 Act. (para 21)

(4) The parties in this case could not agree on a common arbitrator. Section 13 was thus invoked and the court by its power under s. 10(2) made an order referring the dispute to the D-KLRCA for an appointment of an arbitrator as provided for under s. 13(5) of the 2005 Act. Though s. 13(5) states that parties may apply to the D-KLRCA for the appointment of an arbitrator, it is within the court's power to make the order to refer to D-KLRCA under s. 10(2) to reflect and give spirit to the intention of s. 13 of the Act. (para 22)

Case(s) referred to:

Celcom (M'sia) Sdn Bhd v. Sarawak Electricity Supply Corporation [2003] 1 CLJ 6 CA ***(refd)***

D & C Finance Bhd v. Overseas Assurance Corporation Ltd [1989] 2 CLJ 598; [1989] 1 CLJ (Rep) 447 HC ***(refd)***

Legislation referred to:

Arbitration Act 1952, s. 6

Arbitration Act 2005, ss. 10(2), 13(5), 51(2)

For the plaintiff - Thangaraj Balasundram; M/s Thangaraj Assoc
Syed Nasarudin Syed Abd Hadi (Saiful Abd Rahman with him); M/s Radzi & Abdullah
For the defendant - Abu Bakar Jais (Mohamed Noor Mahmood with him); M/s Mohamed Noor, Amran & Yong

Reported by Amutha Suppayah

JUDGMENT

Suraya Othman JC:

Introduction

[1] The appellant/plaintiff ("appellant"), Majlis Ugama Islam Dan Adat Resam Melayu Pahang ("MUIP") filed an appeal against the decision of this court made on 21 June 2007, allowing the application by summons in chambers encl. 6 ("the application") by the respondents/defendants ("respondents") for a stay of proceedings of the originating summons ("OS") under s. 10 of the Arbitration Act 2005 (Act 664) ("the 2005 Act") pending the "dispute" being referred to the Director of Kuala Lumpur Regional Centre for Arbitration ("D-KLRCA") for the appointment of an arbitrator. The reasons for allowing the application is as set forth.

Facts And Background

[2] A Joint Venture Agreement ('JVA') between MUIP, Far East Holdings Berhad ('FEHB') and Kampong Aur Oil Palm Company Sdn Bhd ('KAOP') was signed on 16 January 1992. The main objective of the JVA is to develope a piece of land with a size of 4,481.3 hectares (11,073 acres) injected by MUIP into a commercial oil palm estate. FEHB and KAOP's responsibilities were to develope and provide management expertise on the agriculture development. KAOP incorporated a wholly-owned special purpose company namely Madah Perkasa Sdn Bhd ('MPSB') to implement the project. FEHB is a company listed on the Main Board of Bursa Malaysia and KAOP is a subsidiary of FEHB.

[3] The transfer of the said land was officially made in 1999. In consideration, MUIP received 8,066,417 ordinary shares of KAOP valued at RM1.33 per share. In addition to the consideration shares, FEHB agreed to grant MUIP two options to purchase the ordinary shares of KAOP owned by FEHB.

[4] Clause 2.02(b) of the JVA states that under the first option, "MUIP" has the right to purchase a certain no of shares from "FEHB".

[5] Under cl. 2.02(e), MUIP was granted another option to purchase a number of ordinary shares of KAOP owned by FEHB at a price to be determined. The second option is for a period of three years from the 5th year after all the approvals were obtained and based on management representation such date falls in October 2006.

[6] MUIP currently intends to exercise its second option. Therefore the dispute, *inter alia,* falls on the interpretation of the provision of cl. 2 of the JVA.

[7] The sequence of events following the dispute are follows:

- The appellant, MUIP filed the OS on 22 September 2006 against FEHB, the 1st respondent and KAOP, the 2nd respondent in this case for certain declarations pertaining to their rights and the respondents obligations under the JVA made by them on 16 January 1992.

- The respondents on receipt of the OS wrote to the appellant through their solicitors, Messrs Mohamed Noor, Amran & Yoon on 16 October 2006 referring to cl. 5.01 of the JVA that requires such disputes to be decided by an arbitrator and informing that the respondents are ready, willing and able to refer the disputes arising from the JVA to arbitration.

- The appellant wrote on 7 November 2006, through their solicitors, Messrs Radzi & Abdullah nominating Encik Izzat bin Othman, an experienced advocate and solicitor to be the arbitrator.

- The respondents on 8 November 2006 filed in a summon in chambers ("the application") encl. 6 praying for the OS to be stayed under s. 10 of the Arbitration Act 2005 (Act 646) ("the 2005 Act") and for other orders the court deems fit and on 14 November 2006 wrote to appellant's solicitor informing of their disagreement to Encik Izzat bin Othman as arbitrator and that they would propose the name of another arbitrator once his consent is received. The respondents also suggested that in the event an arbitrator could not be agreed upon, the matter should be referred to the D-KLRCA for such appointment.

- The appellant reverted by a letter dated 20 November 2006 requiring the respondents to propose a name for arbitrator. The appellant also informed the respondents that they are not agreeable to the respondent's suggestion to refer the matter to D-KLRCA as the arbitration clause in the JVA would require consent from both parties.

- By letter dated 27 November 2006, the respondents proposed Encik Mohd. Baharudin bin Ahmad, a leading lawyer on commercial matters to be the arbitrator and again reiterated that in the event that there is a deadlock as to the choice of an arbitrator, they would refer the matter to the D-KLRCA.

- The appellant by their letter dated 5 December 2006 rejected the respondents' choice of arbitrator and reiterated that pursuant to cl. 5.01(f) of the JVA the matter can only be referred to arbitration provided the choice of an arbitrator is agreed upon by both parties.

[8] Thus due to this stalemate on the choice of an arbitrator, the application by the respondents (encl. 6) for a stay of proceedings on the OS was before this court on 21 June 2007. The summons in chambers for the stay of proceedings is as below:

> Benarkan Semula Pihak Yang Berkenaan hadir di hadapan Hakim/ Timbalan Pendaftar pada hari 17 Januari 2007, pukul 9.00 pagi bagi mendengarkan permohonan di pihak Defendan-Defendan untuk mendapatkan suatu Perintah seperti berikut:
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> 1. Keseluruhan tindakan di atas digantung menurut Seksyen 10 AktaTimbangtara 2005.
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> 2. Secara alternatifnya, Defendan-Defendan diberikan masa di dalam tempoh 30 hari untuk memfailkan Afidavit Balasan kepada Afidavit Sokongan yang diikrarkan oleh YDH Dato' Sri Wan Haji Abdul Wahid Bin Wan Hassan berkenaan Saman Pemula (Lampiran 2) Plaintif sekiranya permohonan Defendan-Defendan untuk suatu Perintah Penggantungan menurut Seksyen 10 Akta Timbangtara 2005 ditolak oleh Mahkamah Yang Mulia ini.
>
> 3. Kos ditanggung oleh Plaintif.
>
> 4. Lain-lain Perintah atau relif lanjutan yang difikirkan suai manfaat oleh Mahkamah Yang Mulia ini.

- This court heard the application and allowed the stay of proceedings with costs. The court went further and ordered that the dispute between the parties be referred to the D-KLRCA for the appointment of an arbitrator. It is due to these orders by this court that the appellant has now appealed.

A **Issues To Be Determined By The Court**

[9] The issues before this court are as follows:

(a) Whether the OS proceedings should be stayed and the "dispute" be referred to arbitration.

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(b) Whether the consequential order of the court to refer the dispute to the D-KLRCA was correct.

(a) Whether the OS proceedings should be stayed and "dispute" be referred to arbitration

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In *D & C Finance Bhd v. Overseas Assurance Corporation Ltd* [1989] 2 CLJ 598; [1989] 1 CLJ (Rep) 447, Zakaria Yatim in considering an application for a stay of proceedings, state as follows:

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> In considering whether to grant or refuse the application the court had to be satisfied with the requirements of Section 6 of the Arbitration Act, namely:
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> (1) there was an agreement between the parties and the agreement contained an arbitration clause;
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> (2) that the applicant had not taken any other steps in the proceedings;
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> (3) there must be sufficient reason why the matter should not be referred in accordance with the arbitration agreement; and
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> (4) that the applicant was at the time when the proceedings were commenced still ready and willing to do all things necessary to the proper conduct of the arbitration.

[10] The prerequisites are made simpler and concise in the case of *Celcom (M'sia) Sdn Bhd v. Sarawak Electricity Supply Corporation* [2003] 1 CLJ 6 where Gopal Sri Ram, JCA propounded as follows:

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> The burden on the defendant (to obtain a stay of proceedings under Section 6 of the AA52) was very light; he only had to show that there was an agreement to arbitrate coupled with an assertion by him that he was ready and willing to go to arbitration, and that there was a
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> dispute falling within the scope of the arbitration clause in the agreement. The defendant here was unable to show that there was a dispute falling within the scope of the arbitration clause, to go to the arbitration".

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[11] In the case above, the defendant was unable to show that there was a dispute falling within the scope of the arbitration clause, to go to the arbitration and thus the application for a stay was dismissed.

[12] In our present case, there was an arbitration clause ie, cl. 5.01(f) for parties to go for arbitration if a dispute arises. Clause 5.01(f) states:

> Apa-apa perselisihan pendapat atau pertikaian yang mungkin timbul di antara ketiga-tiga pihak di sini berkaitan dengan Perjanjian ini dan tidak dapat diselesaikan dengan persetujuan bersama hendaklah diputuskan melalui seorang Penimbangtara yang dipersetujui dan dilantik oleh pihak-pihak di sini menurut Akta Timbangtara 1952.

From the reading of cl. 5.01(f), it is clear that it was intended that the choice of an arbitrator has to be agreed upon by all the three parties to the JVA and that the arbitrator will be appointed by the three parties as in accordance to the Arbitration Act 1952 ("1952 Act"). As to the existence of a dispute or disputes, all parties are in consensus that a dispute did exist and that the dispute/disputes are pertaining to the interpretation of cl. 2 of the JVA. The respondents did make assertions that they were ready and willing to go to arbitration. This they did in their letter dated 16 October 2006 upon receiving the OS filed on 22 September 2006. The appellant responded *vide* letter dated 7 November 2006 and nominated Encik Izatt bin Othman as their choice of arbitrator and the respondent responded by filing an application for a stay on 8 November 2006 followed by a letter dated 14 November 2006, rejecting the appellant's choice, and nominating their own choice of arbitrator, Encik Mohd. Baharudin bin Ahmad which the appellant rejected. Thus a stalemate ensues.

From the above facts, it can be clearly seen that there is a dispute when the appellant filed the OS. The respondent did not take any steps in the OS proceedings (ie, filed an affidavit in reply) but instead filed an application for a stay of the "OS" pending the matter be referred to arbitration.

The appellant contended that the matter should not go for arbitration on account that the parties cannot agree on a common arbitrator, therefore rendering cl. 5.01(f) inapplicable and bad for uncertainty. The appellant further contended that the court is a better forum to decide the present dispute since it relates to the interpretation of clauses in the JVA and such dispute should be resolved in court since it does not require any special knowledge. The appellant submitted that no action was taken by the respondents to refer the matter for arbitration despite the fact that the dispute had been ongoing since 2002 and that the respondents only raised the issue of arbitration when the substantive application ie, the OS was filed on 22 September 2006.

[13] This court disagrees with the appellant's contention. Parties had entered an agreement (JVA) and under cl. 5.01(f) consented to submit to arbitration if there were differences of opinion or dispute which cannot be resolved amicably. If the court were to take the arbitration clause lightly and entertained every disgruntled party, then the court will be burdened and inundated with cases which it should not have heard in the first place. In terms of statistic, there are thousands of cases waiting to be heard and disposed of by the court, so why should this court took it upon itself to hear a dispute which could be best decided upon speedily by an arbitrator, in this instant, one which is well versed in share options and the correct pricing of shares.

[14] On the contention that the respondents referred the matter for arbitration only after the appellant took the substantive action (OS) despite the dispute being ongoing since 2002, from the records it could be seen that the second option to be exercised by the appellant will only expire sometime in October 2006 which option the appellant has yet to exercise. Anyway the parties were still negotiating for a settlement even at the time the OS was filed and before the application for the stay was heard. Furthermore, after the OS was filed by the appellant and the respondent protested that the matter should go for arbitration, the appellant entertained the protest by nominating an arbitrator. Therefore the appellant here is estopped from contending that the respondent took no action to refer the matter for arbitration, since by its own conduct it too was eager to refer the matter for arbitration and only recoiled from that recourse after a stalemate as to the choice of an arbitrator arose.

[15] Therefore based on the foregoing reasons, the OS proceedings should be stayed and the "dispute referred to arbitration".

(b) Whether the consequential order of the court to refer the dispute to the D-KLRCA was correct

The arbitration clause, cl. 5.01 states that the Arbitration Act 1952 applies. In our present case the respondent has applied for a stay under cl. 10 of the 2005 Act and not under cl. 6 of the 1952 Act.

[16] The next question is which clause applies, cl. 6 of the 1952 Act or cl. 10 of the 2005 Act (both clauses are somewhat similar in its application). This court is of the view that cl. 10 of the 2005 Act applies. Clause 10 state as follows:

> Arbitration agreement and substantive claim before court
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> 10. (1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds -

(a) that the agreement is null and void, inoperative or incapable of being performed; or

(b) That there is in fact no dispute between the parties with regard to the matters to be referred.

(2) The court, in granting a stay of proceedings pursuant to subsection (1), may impose any conditions as it deems fit.

(3) Where the proceedings referred to in subsection (1) have been brought, arbitral proceedings may be commenced or continues, and an award may be made, while the issue is pending before the court.

[17] Clause 13(5) of the 2005 Act further states as follows:

(5) Where in an arbitration with a single arbitrator -

(a) the parties fail to agree on the procedure referred to in subsection (2); and

(b) the parties fail to agree on the arbitrator, either party may apply to the Director of the Kuala Lumpur Regional Centre for Arbitration for the appointment of an arbitrator.

[18] In our present case, parties failed to appoint an arbitrator, therefore the court under s. 10(2) grant a stay of proceedings and imposed a condition it deems fit, that condition being that the dispute be referred to the D-KLRCA for an appointment of an arbitrator as provided for under s. 13(5) of the 2005 Act.

[19] Why did this court decide that s. 10 of the 2005 Act and not s. 6 of the 1952 Act applies, is found in s. 51 of the 2005 Act which states as follows:

Repeal and savings

51. (1) The Arbitration Act 1952 (Act 93) and the Convention on the recognition and Enforcement of Foreign Arbitral Awards Act 1985 (Act 320) are repealed.

(2) Where the arbitral proceedings were commenced before the coming into operation of this Act, the law governing the arbitration agreement and the arbitral proceedings shall be the law which would have applied as if this Act had not been enacted.

A (3) Nothing in this Act shall affect any proceedings relating to arbitration which have been commenced in any court before the coming into operation of this Act.

[20] As can be seen, the 2005 Act which came into force on 31 December 2005, repealed the Arbitration Act 1952. By virtue of B s. 51(2), where the arbitral proceedings were commenced before the coming into operation of this Act, the law governing the arbitration agreement and the arbitral proceedings shall be the law which would have applied as if this Act had not been enacted. The 2005 Act came into force on 31 December 2005, the date it was gazetted and became C law. Any arbitral proceedings commenced before 31 December 2005 is governed by the 1952 Act, and, likewise, any arbitral proceedings commenced after 31 December 2005 will be governed, by implication, by the 2005 Act.

D **[21]** In our present case arbitral proceedings commenced when the respondent wrote to the appellant on 16 October 2006 protesting on the appellant's action in taking the dispute to the High Court by way of OS application and requesting the appellant to refer the dispute for the arbitration. Therefore by way of interpretation of s. 51(2), the law governing the arbitration agreement and arbitral proceedings in this case E would be the 2005 Act and not 1952 Act since the arbitral proceedings commenced on 16 October 2006, much after the 2005 Act came into force on 31 December 2005.

[22] The parties in this case cannot agree on a common arbitrator. F Section 13 is thus invoked and the court by its power under s. 10(2) made an order referring the dispute to the D-KLRCA for an appointment of an arbitrator as provided for under s. 13(5) of the 2005 Act. Though s. 13(5) states that parties may apply to the D-KLRCA for the appointment of an arbitrator, this court feels that the fact this court itself makes the order to refer to D-KLRCA, is in itself within its power G under s. 10(2) to make such consequential order or condition as it deems fit and to reflect and give spirit to the intention of s. 13 of the Act.

Conclusion

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[23] For the reasons as adumbrated above, I allowed the respondents' application with costs for a stay of proceedings (encl. 6) and make a consequential order that the dispute be referred to the D-KLRCA for the appointment of arbitrator.

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